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ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 5th September 1957

S.R.O. 2860.—Whereas the election of Shri Jawahar Lal Nehru and Shri Masuriya Din, as members of the House of the People from the Phulpur Constituency, has been called in question by an Election Petition duly presented under Part VI of the Representation of the People Act, 1951 (43 of 1951), by Shri Sitaram Khemka, resident of Mohalla Chowk, Monghyr (Bihar);

And whereas, the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of section 86 of the said Act, for the trial of the said election petition, has sent a copy of its order to the Commission;

Now, therefore, the Election Commission hereby publishes the said order of the Tribunal.

IN THE COURT OF THE MEMBER, ELECTION TRIBUNAL AT ALLAHABAD

PRESENT:

Hon'ble Shri K. K. Banerji.

Election Petition No. 351 of 1957

Shri Sita Ram Khemka 1 SHRI JAWAHARLAL NEHRU AND

2. Shri Masuriya Din.

The 30th July 1957

There are two separate applications on behalf of respondents 1 and 2, raising preliminary objections and praying that the petition of Shri Sita Ram Khemka should be dismissed under section 90, sub-section (3) of the Representation of the People Act, hereinafter to be referred as the Act. A petition, supported by an affidavit, has also been filed by Shri Sita Ram Khemka, stating that due to the mistake of his lawyers and his typist, relief No. 2 in his petition was not deleted and, as such, he should be permitted now to strike out the second relief, namely,

> "It is further prayed that the petitioner who secured the highest number of votes next to respondent No. 1 in the election for the general seat to the Lok Sabha from 334, Phulpur Parliamentary Constituency be declared as duly elected."

A few facts are necessary to be stated for proper appreciation of the case. Shri Sita Ram Khemka has challenged the result of the election in this Constituency and, in his petition, he has claimed two reliefs according to the provisions of section 84 of the Act. His first relief is as follows:—

> It is, therefore, prayed that the election (of) respondent Nos. 1 and 2 who are the returned candidates to the Lok Sabha at Delhi be declared void, illegal and against law and by practising corrupt practices."

According to Shri Khemka, the petitioner, he had drafted his petition at Allahabad, claiming these two reliefs and the draft was taken to Delhi. There, his lawyers advised him to delete relief No. 2 and to proceed with relief No. 1 only, against respondents 1 and 2. Their advice further was that the names of the other four candidates, who took part in the election should be struck out from the original draft. In accordance with this advice, it is alleged, the petitioner asked his typist to type out the draft petition deleting relief No. 2 and the names of the other four candidates who had taken part in the election, but, unfortunately, the typist, by some accidental slip, forgot to strike out relief No. 2 while striking out the names of the four candidates. The petitioner afterwards filed his petition on the belief that his typist had changed the portions of the draft according to the instructions given to him. It is difficult for me to believe this story. No name of any lawyer who drafted the petition at Allahabad has been disclosed; nor has the name of any Delhi lawyer been mentioned. Again, I am not in a position to know the typist who is said to have committed this grave mistake. The original draft is also not forthcoming. The respondents have therefore had, no opportunity to contest the correctness of the application of Shri Khemka. In these circumstances, I cannot but reject the prayer of the petitioner to delete relief No. 2 on the ground that it was not deleted by the mistake of his typist.

I shall now advert to the objections raised on behalf of the respondents in order to ascertain that would be the result when two reliefs are claimed but all the candidates who took part in the election are not joined as parties to the petition. According to article 329(b) of the Constitution, "no election to either House of Parliament or to the House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature". According to section 80 of the Representation of the People Act, no election shall be called in question except by an election petition in accordance with the provisions of this part, that is, Part VI of the Act. It follows, therefore, that an election petition, in order to be a valid one, should conform to the provisions of sections 81, 82, and 84 of the Act and also comply with requirements of section 117. Section 81 provides as to who can present an election petition; it also lays down the manner of presentation and the grounds on which such election petition should be based. It also limits the time within which such election petition should be submitted. Section 82 of the Act lays down that a petitioner shall join as respondents to his petition (a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; (b) any other candidate against whom allegations of any corrupt practice are made in the petition. According to section 84 of the Act, a petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.

Shri Khemka, having claimed this relief that he, himself, should be declared as duly elected, was required by the provisions of section 82 of the Act to join as respondents all the contesting candidates other than himself. As the petition stands at present, he has claimed a declaration that he, himself, has been duly elected without joining as respondents the four other contesting candidates. Section 85 of the Act provides that if the provisions of section 81 or section 82 or section 117 have not been complied with, the Election Commission shall dismiss the petition: provided that the petition shall not be dismissed without giving the petitioner an opportunity of being heard. It appears from the order-sheet of the Election Commission that it was aware of the fact of non-compliance with the provisions of section 82 of the Act and it called upon the petitioner to show cause by the 15th of May, 1957, why the petition should not be dismissed summarily for non-compliance of the aforesaid section. From the order-sheet, dated the 15th of May, 1957, of the Election Commission, it further appears that the petitioner did not appear either in person or through a duly empowered lawyer, and he sent a

letter from the Delhi Central Jail, praying for adjournment as he was not in a position to conduct the case from the jail. The Commission, therefore, passed the order as follows:—

> "It will be for the election Tribunal to decide at the trial after hearing the parties if the issues as to the non-joinder of the parties should necessarily affect the second prayer. The Commission does not desire to express any opinion regarding the same."

Thereafter, the election petition was admitted and when a copy of the petition had been published in the official Gazette, this Tribunal was appointed to dispose of the petition of Shri Khemka. It appears from the order mentioned above that the Election Commission did not intend to dismiss the petition without hearing the petitioner, and this he was not in a position to do at very near future, as the petitioner was in jail and there was no material before him to find out as to when he would be able to come out to meet the question which had arisen due to the peculiar framing of the petition.

Section 90 sub-section (3) of the Act provides that the Tribunal shall dismiss an election petition which does not comply with the provisions of sections 81, 82 or section 117, notwithstanding that it has not been dismissed by the Election Commission under section 85. This sub-section empowers the Tribunal to review an order of an Election Commission when he has not dismissed an election petition, although the provisions of sections 81, 82 and section 117 had not been complied with. In this particular case, there is no question of reviewing or revising the order of the Election Commission as it refrained from passing any order for the non-compliance of section 82 of the Act and further directed that the matter should be decided by the Tribunal, itself. It appears to me that the Legislature has purposely, provided two separate penal provisions when the petitioner fails to comply with the provisions of sections 81, 82 and 117 of the Act.

Laying down the same provision of penalty in two different sections shows clearly the intention of the Legislature to this effect that the Tribunal should not brush aside any omission on the part of the petitioner in an election petition in relation to sections 81, 82 and 117 of the Act. That the two sections, 85 and 90(3), are of mandatory character is further proved by looking at the changes which occurred when Act XLIII of 1951 was amended by Act XXVII of 1956. There was no change so far as section 80 was concerned. In section 81 there were a few minor changes with which I am not concerned. Section 82, however, underwent an important change. According to the old section 82, a petitioner was to join as respondent to his petition all the candidates who were duly nominated at the election other than himself if he was so nominated. According to the new section 82, a petitioner is given the option to join as respondents all the contesting candidates or all the returned candidates according to the relief or reliefs which he claims. There is not much difference between the old section 84 and the new section 84, except that clause (c) of the old section 84 has been deleted in the new one. As regards section 85, a vital change was made by the Legislature. According to the old section the Election Commission was required to dismiss the petition if the provisions of sections 81, 83 and section 117 were not complied with. In the new section, "Section 83" was taken out and "section 82" was inserted. Again, the entire proviso to the old section 85 was discarded and a new proviso was engrafted in which it was stated that the petition was not to be dismissed without giving the petitioner an opportunity of being heard. The proviso to old section 85 which gave power to the Election Commission to exercise his discretion in condoning failure in presenting a petition within the period prescribed was dropped. There was drastic change of the provisions of old section 90, sub-section (4) which correspond to new section 90 sub-section (3). Section 90, sub-section (4) of the old Act was in the following words:—

> "Notwithstanding anything contained in section 85, the Tribunal may dismiss an election petition which does not comply with the provisions of section 81, section 83, or section 117."

The wording of the present section 90, sub-section (3) are as follows:—

> "The Tribunal shall dismiss an election petition which does not comply with the provisions of section 81, section 82 or section 117, notwithstanding that it has not been dismissed by the Election Commission under section 85".

It is significant that the word "may" was taken out and was substituted by the word "shall". It appears to me, therefore, that two penalty provisions were

enacted by the new Act by which the Legislature made it absolutely clear that it would not tolerate any defect with regard the provisions contained in sections 81, 82 and section 117 of the Act. By section 85 of the Act, the Legislature first empowered the Election Commission, itself, to dismiss the application, of course, after hearing the petitioner, when the provisions of these three sections had not been complied with. Notwithstanding this power given to the Election Commission, the Legislature further provided that the Tribunal shall dismiss an election petition for non-compliance of these three sections even if the Election Commission had failed to dismiss it on the same ground. The intention, to my mind, is, obvious, that is, that sections 81, 82, and 117 were to be placed under one and a separate classification, alone, and the election petition should be treated as a composite one not capable of being split up so far as these three sections were concerned. It is incumbent upon the petitioner to observe all the formalities as laid down under these three sections before filing an election petition, and if he fails to do so he does it at the risk of the petition being rejected or dismissed *in limine* either under section 85 or under section 90, sub-section (3) of the Act.

There can be no denying of the fact that section 85 and section 90(3) are in the nature of penalty clauses for non-observance of the requirements or formalities of section 81, 82 and 117, and if the word "shall" appears in such clauses, that must be taken to be strictly mandatory. I am unable to accede to the contention of Mr. Mukerji, appearing for the petitioner, that in the present case this Tribunal should read the word "shall" as "may" and proceed with the petition after deleting relief No. 2. I am also unable to agree with Mr. Mukerji that section 90, sub-section (1) controls sub-section (3) of the same section. I have already held in two other petitions, *viz.*, 336 of 1957 and 451 of 1957 that Civil Procedure Code read with section 90(1) can have application only when it is not in conflict with any provision of the Act or any rule made thereunder. Sub-section (3) of section 90 lays down, with a great deal of emphasis, that the Tribunal has to dismiss an election petition when the provisions of sections 81, 82 and 117 are not complied with, and, in such circumstances, I am not in a position to hold that in spite of the specific direction in sub-section (3), I should apply the Code of Civil Procedure and allow the prayer of amendment as made by the petitioner. Mr. Mukerji has cited Jwala Prasad Misra v. Mahadeo and others (3 Election Law Reports, 473). That decision related to the old sections and I am afraid, I cannot derive any benefit out of the principles laid down therein.

Mr. Dar, appearing on behalf of respondent No. 1 has advanced yet another ground for throwing out the present election petition. He has referred to section 97 of the Act and has argued that when an election petition containing a relief or reliefs is filed, and afterwards referred to a Tribunal, the respondent gets a right to recriminate, that is, to lay counter-charges against the petitioner under section 97 of the Act and to prove that the petitioner, himself, had been guilty of corrupt practices. According to him, the respondent gets an opportunity in law not only to have the petition dismissed by proving the allegation against the petitioner but he gets a further opportunity to have the petitioner disqualified under section 140 of the Act. He has further referred to sections 109 and 110 of the Act which relate to withdrawal of petitions after appointment of Tribunals and the procedure for withdrawal on such petitions. He has also referred to section 81, and other sections showing that when an election petition is filed a right accrues to all the electors in the constituency to watch the proceedings, and in case the petitioner retires, they or any of them are entitled in law to carry on with the petition and pray for a declaration that the seat be given to the original petitioner, although, the petitioner, himself, chooses to walk out of the picture. The representative character of the election petitions is, according to him Palpable from the provisions of section 115 of the Act which provides for substitution of any voter in case the petitioner dies. Mr. Dar argues that prayer for amendment or deletion of relief 2 of the petition is tantamount to withdrawal of a part of the petition. In support of his contention, he cites the case of Aldridge v. Hurst (L. R. Common Pleas Division, 1876, Vol. I, P. 410) and relies on the observation made at p. 415. He also cites Halsbury's laws of England (3rd Edition), Vo. XIV, Paragraph 451 and particularly refers to Note (g) at page 259 to support his contention that the principle laid down in Aldridge v. Hurst was correct and his not suffered any change even now. I do not want to express any finding on this branch of the argument advanced on behalf of the r ondent, but it is to be conceded that this contention has considerable force.

I feel I am helpless, as the law stands, to grant the prayer of the petitioner, which at first struck me as being merely of a technical nature. On a careful consideration of all the sections, old and new, I am convinced, that the law on this technicality has specifically been rendered rigid and unyielding and there is no

escape, on any grounds, whatsoever, for the petitioner, for the calamitous consequences for non-compliance of sections 81, 82 and 117 of the Act. What the intention of the Legislature was for making these sections so rigid, I do not know. I can only say that the rigidity prevents me from giving any relief to the petitioner as prayed for. Accordingly, the election petition filed by Shri Sita Ram Khemka is dismissed under section 90, sub-section (3) of the Representation of the People Act. There will be no order as to costs.

As the election petition itself has been dismissed it is no longer necessary for me to take up the other preliminary objections relating to the deletion of certain paragraphs of the petition under order VI rule 16 of the Code of Civil Procedure.

(Sd.) K. K. BANERJI,
Member, Election Tribunal at Allahabad.

[No. 82/351/57/1577.]
By Order,
A. KRISHNASWAMY AIYANGAR, Secy.

July, 30, 1957.

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